But if, on the other hand, there be a gross revenue tax which is to be in addition to taxes levied and collected upon an *ad valorem* basis upon property and assets, this would seem an almost conclusive factor the other way.[14]

The true distinctions in the matter appear to have been overlooked by a holding not long ago in a lower Texas court in favor of the validity of a statute imposing upon terminal companies an "occupation tax" equal to one per cent of their gross receipts. *State* v. *Houston Belt & Terminal Ry. Co.*, 166 S. W. 83 (Tex. Civ. App.).[15] The court, quoting from the repudiated reasoning of one of the earlier United States Supreme Court cases,[16] relies chiefly upon the word "occupation" to make the enactment constitutional. But this would seem to lead to the opposite conclusion; for if the statute really provides for what it declares it does, namely, an assessment upon the privilege of conducting the occupation of a terminal company, it would be clearly invalid.[17] Nevertheless, if in spite of its name the statute provides for what is in reality a property tax, the statutory title may be disregarded and the substance of the statute investigated.[17] By its terms nearly all the old taxes are to continue, except one upon intangible [18] assets.[19] It does not appear what the intangible assets of the contesting terminal company are worth, but if the amount of the tax when compared with the value of those assets is not excessive,[12] then the assessment here may constitutionally be defended as a property tax.[20] Nor can there be any question as to apportionment of the valuation of the intangible assets according to the Texas mileage,[21] as the mileage of this terminal company is all within the state.

Accordingly, should the occasion arise to review this decision, the United States Supreme Court, although it conceivably might uphold the tax, would seemingly have difficulty in reconciling the reasoning of the court with the prevailing principles governing the utilization of the proceeds of interstate commerce as a basis for taxation.

DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE OFFICIALS. — Recent decisions afford frequent illustration of changes in the law to meet altered social, economic, and political conditions. The United States Supreme Court has lately held that a married woman may acquire a domicile apart from her husband for the purpose of

[14] See Oklahoma *v.* Wells, Fargo & Co., *supra*.

[15] This case is more completely stated in this issue of the REVIEW, p. 115.

[16] Maine *v.* Grand Trunk Ry. Co., *supra*.

[17] Postal Telegraph Co. *v.* Adams, 155 U. S. 688.

[18] Intangible assets comprise the property value of the franchise, commercial securities, choses in action, good-will, the value of the business as a going concern, etc. See article by Professor Beale, 17 HARV. L. REV. 248.

[19] The tax upon intangible assets was imposed by ACT 29TH LEG., C. 146. A former "occupation" tax, imposed by ACT 29TH LEG., C. 148, was repealed by the statutory enactment in question.

[20] In Maine *v.* Grand Trunk Ry. Co., *supra*, the intangible assets were all that were left untaxed, and yet the statute was upheld.

[21] This was the method employed in Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, and in Maine *v.* Grand Trunk Ry. Co., *supra*.

bringing suit other than for divorce.[1] Decisions upholding the constitutionality of statutes limiting the hours of labor of men [2] and women [3] are now numerous; even a minimum wage law has been sustained.[4] The necessities of modern government require the application of technical knowledge to complex situations. Herein is the explanation of the tendency toward government by commission.[5] Thus, also, statutes which would have been condemned a generation ago as unlawfully delegating legislative power to administrative officials are now sustained. A case strikingly illustrative was recently determined in Porto Rico. *People of Porto Rico* v. *Neagle*, Sup. Ct. P. R., Aug. 1, 1914 [6] (not yet reported). A statute levying a license tax on the doing of certain businesses provided that the Insular Treasurer should classify each taxable business into one of five classes according to the importance of the business, as measured by the volume of business done and in comparison with other similar businesses. The amount of tax for each class was specified. The statute was upheld against an attack that no standard of classification was defined and therefore that legislative power was granted to the Treasurer to fix the rate of taxation.[7]

To the principle that legislative power cannot be delegated, one exception has always been admitted, that power over local affairs may be delegated to municipalities.[8] Another exception is that the enforcement of legislative enactments may be made contingent.[9] Application of the latter principle in *Field* v. *Clark*,[10] where the occurrence of the contingency was within the discretion of the executive, was the beginning of a line of cases which have gone much further, and evolved the rule that the legislative enactment is valid if it lays down a general rule or fixes a "primary standard" for the guidance of administrative officers, though delegating power to administrative officers to exercise discretion "to fill in the details." These cases have upheld statutes which have authorized executive officials to fix the standard of inferiority of tea, where the importation of inferior tea was prohibited;[11] to remove

[1] Williamson *v.* Osenton, 232 U. S. 619.

[2] Missouri K. & T. Ry. Co. *v.* United States, 231 U. S. 112.

[3] Muller *v.* Oregon, 208 U. S. 412; Riley *v.* Mass., 232 U. S. 671.

[4] Stettler *v.* O'Hara, 139 Pac. 743 (Ore.). For a discussion of this case, see this issue of the REVIEW, p. 89.

[5] See 25 HARV. L. REV. 704.

[6] A statement of this case appears in RECENT CASES, p. 105.

[7] The Organic Act of Porto Rico, Act of Congress of April 12, 1900 (31 Stat. L. 77), commonly known as the Foraker Act, delegated legislative power to the Legislative Assembly of Porto Rico. To fix the rate of taxation is a legislative function. Central R. Co. *v.* State Board, 49 N. J. L. 1; State *v.* Mayor, etc. of Des Moines, 103 Ia. 76, 72 N. W. 639; State *v.* Hudson Co. Com., 37 N. J. L. 12.

[8] COOLEY, CONST. LIMITATIONS, 6 ed., pp. 137, 248, 724; DILLON, MUNICIPAL CORPORATIONS, 6 ed., §§ 244, 889, 1383; MCQUILLAN, MUNICIPAL CORPORATIONS, §§ 382, 384, 386, 728, 998, 2360, 2363.

[9] WILLOUGHBY, CONSTITUTION, § 775 *et seq.*

[10] 143 U. S. 649. In this case the majority of the court upheld the reciprocity act, which provided that whenever and so often as the President should deem the tariff of a foreign country reciprocally unequal and unreasonable, he should suspend the congressional act for such time as he should deem just. The dissenting opinion of Justices Lamar and Fuller is a strong presentation of the orthodox rule against delegating legislative power.

[11] Buttfield *v.* Stranahan, 192 U. S. 470.

obstructions to navigation deemed unreasonable;[12] to fix the standard height of drawbars;[13] to establish rules necessary for the preservation of forests;[14] and to establish a uniform system of railroad accounts.[15] The old rule requiring the legislature to make the law confined the lawful exercise of discretion by administrative officials within narrow bounds.[16] Thus has come a distinct departure, and wide discretion is now permitted to executives, even to tell what the law is. Although in the Supreme Court cases it was demonstrated that the statute had provided some "primary standard" or "general rule," often it was only that of reasonableness; the significant reasoning appeared in the statement, that to deny the validity of such statutes "would stop the wheels of government."[17]

. The Porto Rican case is plainly right in following the controlling authorities,[18] likewise in denominating the Treasurer's duties administrative. But it is to be noted that the conception of what constitutes legislative powers so that their delegation is unconstitutional has changed, and that the exercise of certain discretionary power by administrative officers formerly considered legislative is now held unobjectionable.

THE FIVE PER CENT RATE CASE.[1] — The decision rendered this summer by the Interstate Commerce Commission in the so-called Five Per Cent Case is illustrative of the difficulties involved in regulating interstate commerce rates. *The Five Per Cent Case*, 31 I. C. C. 551.[2] The railroads serving official classification territory, which includes all that part of the United States from the Atlantic seaboard to the Mississippi River north of the Ohio River, joined in this proceeding to secure the Commission's approval of a so-called five per cent increase in their freight rates. The increases proposed ranged from five per cent to as high as fifty per cent on certain short-haul traffic, with a provision for a minimum increase of five cents per ton in all rates named in cents per ton when less than $1.00.

The Commission was unanimous in its decision, "that the net operat-

[12] Union Bridge Co. *v.* United States, 204 U. S. 364.

[13] St. Louis Ry. Co. *v.* Taylor, 210 U. S. 281.

[14] United States *v.* Grimaud, 220 U. S. 506.

[15] I. C. C. *v.* Goodrich Transit Co., 224 U. S. 194; Kans. City So. Ry. Co. *v.* United States, 231 U. S. 423.

[16] See cases *supra*, footnotes 7 and 8.

[17] Field *v.* Clark, 143 U. S. 649, 694; Buttfield *v.* Stranahan, 192 U. S. 470, 496; Union Bridge Co. *v.* United States, 204 U. S. 364, 385, 386, 387.

[18] The cases upholding the power of commissions to regulate rates, where the standard is that of reasonableness, furnish strong analogies. Chicago & N. W. Ry. Co. *v.* Dey, 35 Fed. 866 (1888); People *v.* Willcox, 194 N. Y. 383, 87 N. E. 517; Oregon R. & N. Co. *v.* Campbell, 173 Fed. 957; State *v.* R. Com., 52 Wash. 33, 100 Pac. 184; So. I. Ry. Co. *v.* R. Com., 87 N. E. 966 (Ind.); Louisville & N. R. Co. *v.* I. C. C., 184 Fed. 118. For a discussion of the recent Intermountain Rate Cases, where the Supreme Court did not object to a considerable delegation of such power, see RECENT CASES, p. 110.

[1] The facts involved in this important decision are so voluminous and complicated that an extended discussion of the principles involved cannot be attempted within the confines of this note, but it is thought that a brief résumé of the decision itself may be of interest to the profession.

[2] A rehearing of this case has already been ordered by the Commission on a petition by the railroads.